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SUBJECT: ENGELHARD LOSES IN FINAL COURT RULING

REF: A) 05 LIMA 4228, B) 05 LIMA 4033

¶1. (U) Summary: By a decision of 5-1, the Constitutional Court ruled against gold trading firm Engelhard of New Jersey, holding that the company's rights had not been violated by the Tax Court. With this negative decision, the company has exhausted all its legal options in Peru. The company is contemplating taking the dispute to the Inter-American Court of Justice. The GOP Commercial Disputes Coordinator told us that the company had pursued the wrong course of action, choosing to challenge the process through an injunction instead of through administrative litigation. End Summary.

¶2. (U) The Constitutional Court issued a 5-1 decision against Engelhard on January 25, stating that the company's constitutional rights had not been violated by the Tax Court as the company had claimed (reftels). The Appeal to the Constitutional Court ("accion de amparo") over due process was the last legal recourse in Peru available to the U.S. company.

No "Problem" with 2003 Tax Court Ruling

¶3. (U) Peru's Tax Court in February 2003 upheld tax agency SUNAT's 1999 action to draw down two Engelhard letters of credit (worth approximately \$20 million) and withhold about \$10 million in tax refunds claimed by the firm. SUNAT argued that Engelhard, as part of the chain of commercialization, had been involved in phony gold transactions to take advantage of a tax rebate regime. In its 2003 ruling, the Tax Court cited three pieces of evidence, two of which were not in the Engelhard case file; none of these directly incriminated Engelhard. The company argued that it did not have access to the two reports at the time of the Tax Court ruling, and that its rights had been violated because the company could not defend itself against evidence it never saw.

Narrow Constitutional Court Focus

¶4. (U) The Constitutional Court addressed two issues. The first was the "existence" of two reports that Engelhard stated were not in the official court file at the time of the February 2003 Tax Court ruling. The Court concluded that the reports did "exist" and that the company had knowledge of them. The Court disregarded a police

investigation launched by the company that demonstrated that one of the reports, a Universidad Nacional de Ingenieria report, was a preliminary unsigned study (not valid evidence in Peru). (Note: The report supposedly proved that a gold refinery could not have refined gold bought by Engelhard through a supplier because of a missing chemical input. The authors of the university report told the police that SUNAT provided them with all of the information for their report, and that they never corroborated their findings with the gold refining firm. The authors admitted to police investigators that the report was a preliminary document from which no conclusions could be drawn. One of the authors was not an engineer, as claimed in the report. End Note.)

15. (U) The second issue the Constitutional Court addressed was whether the company could be held responsible for actions of third parties. Engelhard has argued all along that it should not be blamed for any wrongdoing committed down the chain of commercialization by other companies. Engelhard stated that it bought gold and paid IGV taxes to registered gold suppliers. On this point, the Constitutional Court concluded that an injunction was not the appropriate venue ("no es procedente") to reevaluate evidence and claims about third parties.

16. (U) The Constitutional Court concluded that it considered the evidence presented by the Tax Court in 2003 to be sufficient. The Constitutional Court noted that the two missing reports "did exist," and that the Tax Court did not rely exclusively on these reports. The Constitutional Court cited a report from the Ministry of Energy and Mines about gold production during the period in question, and alluded to other evidence reviewed by the Tax Court that the Constitutional Court did not identify.

GOP: Engelhard Chose Wrong Legal Strategy

17. (SBU) GOP Commercial Disputes Coordinator Aurelio Loret de Mola told Econcouns that while he did not like the decision, the ruling was a sound one -- well substantiated and a demonstration of due process. Loret de Mola stated that in his opinion Engelhard's attorneys had pursued the wrong course of action. Instead of arguing the facts in administrative litigation (contencioso administrativo), the company chose to file an injunction, which is predominantly a review of process, not facts, he emphasized. (Note: Engelhard had no choice but to chose between the two options. The company pursued the injunction route because the court of last instance was the Constitutional Court, which is considered more independent and reliable. End note.)

Company in Disbelief Over Decision

18. (SBU) Outraged with the result, Engelhard is planning a media campaign to publicly challenge the decision, which it describes as an aberration of Peruvian law. The company's lead local attorney, Cecilia Delgado, told us that if the decision is permitted to stand, it would set a precedent by allowing tax agency SUNAT to use whatever evidence it desires to go after tax payers, including tax information in other case files to which an accused party does not have access. (Note: We consulted two attorneys not affiliated with the company about the missing evidence issue; they indicated that a basic tenet of law is that all evidence needs to be in the file of the accused. End note.)

19. (SBU) Engelhard made an administrative appeal within the three-day limit of the decision, but this is not likely to change the result. The company is contemplating taking the dispute to the Inter-American Court of Justice in Costa Rica.

Comment: Where's the Beef?

¶10. (SBU) The Court decision is disappointing, particularly since there is no apparent evidence that directly links the company to any wrongdoing. Loret de Mola had assured USTR that the Constitutional Tribunal would get to the bottom of the matter. Still pending is a separate criminal proceeding against two local Engelhard executives. The Prosecutor had recommended to the judge that the executives be excluded from the case. The judge has yet to determine whether the case will go to trial without the company executives. This penal proceeding, which has more than 200 defendants from the gold sector, is more than 5 years old.

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